

The Honorable Benjamin Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

CLYDE RAY SPENCER, MATTHEW  
RAY SPENCER, and KATHRYN E.  
TETZ,

Plaintiffs,

v.

FORMER DEPUTY PROSECUTING  
ATTORNEY FOR CLARK COUNTY  
JAMES M. PETERS, DETECTIVE  
SHARON KRAUSE, SERGEANT  
MICHAEL DAVIDSON, CLARK  
COUNTY PROSECUTOR'S OFFICE,  
CLARK COUNTY SHERIFF'S  
OFFICE, THE COUNTY OF CLARK  
and JOHN DOES ONE THROUGH  
TEN,

Defendants.

NO. C11-5424BHS

MOTION FOR SUMMARY  
JUDGMENT OF DEFENDANT  
JAMES PETERS

NOTED FOR: June 22, 2012

**I. RELIEF REQUESTED**

Defendant James M. Peters moves for summary judgment seeking dismissal of all claims against him with prejudice pursuant to Federal Rules of Civil Procedure 56. Defendant Peters' motion is based upon his absolute immunity for all matters related to the prosecution of plaintiff Clyde Ray Spencer, qualified immunity for all § 1983 claims not barred by absolute immunity, the statute of limitations as to all plaintiff's state law claims, collateral estoppel precluding Mr. Spencer's federal constitutional claims, and lack of any evidence to prove a conspiracy.

1 The motion for summary judgment of defendant Peters is based upon the declarations of  
 2 James M. Peters and Patricia C. Fetterly filed in support of this motion as well as the declarations  
 3 of Shirley Spencer (ECF No. 53), Matthew Hansen (ECF No. 54), Jeffrey Freimund (ECF No. 63)  
 4 and Sharon Krause (ECF No. 64) which have been filed with the Court.

## 5 6 II. MATERIAL FACTS

7 In 1985, plaintiff Clyde Ray Spencer was charged with sexually abusing his two  
 8 children, Matthew Spencer and Kathryn Spencer Tetz, and his stepson Matthew Hansen. He  
 9 entered an *Alford* plea of guilty to the majority of the charges on May 16, 1985. He was  
 10 sentenced to prison one week later on May 23, 1985. In 2004, then Governor Locke  
 11 conditionally commuted his sentence. Mr. Spencer filed a personal restraint petition in 2007  
 12 supported by declarations from Matthew Spencer and Kathryn Spencer Tetz in which they  
 13 recanted their allegations. **Matthew Hansen, plaintiff's stepson, has never recanted his**  
 14 **allegations and maintains to this day that his stepfather sexually abused him.** (ECF  
 15 No. 54).  
 16

17 Mr. Spencer's personal restraint petition was granted. He was allowed to withdraw his  
 18 *Alford* plea based upon the recantations made by his two natural children. In September of  
 19 2010, the Clark County Prosecuting Attorney elected not to pursue further prosecution, and the  
 20 case was dismissed without prejudice. Clyde Ray Spencer and his two natural children have  
 21 filed this lawsuit alleging tort claims related to the investigation of the allegations by law  
 22 enforcement officers and claims against James Peters who was a deputy prosecuting attorney  
 23 for Clark County in 1985.  
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Defendant Peters incorporates the Material Facts outlined in defendant Davidson's Summary Judgment Motion, pgs 2–13 (ECF No. 62). In addition, defendant Peters sets forth the following facts that are particularly pertinent to the claims against him:

**A. The Decision To File Criminal Charges**

In 1984 and 1985 James Peters was employed as a Deputy Prosecuting Attorney for Clark County, Washington. As a deputy prosecuting attorney, he reported to Arthur Curtis, then the elected Prosecuting Attorney for Clark County.<sup>1</sup>

In November and December 1984 Mr. Peters reviewed reports of law enforcement officers to assist Mr. Curtis in making a determination whether to file criminal charges against plaintiff Clyde Ray Spencer. These included reports of law enforcement officers in Sacramento, California where Kathryn Spencer resided with her natural mother and reports of Sharon Krause, then a detective with the Clark County Sheriff's Department. Ms. Krause had previously traveled to Sacramento and interviewed Kathryn, then age five, and other witnesses in follow up to disclosures Kathryn had made to her stepmother Shirley Spencer of possible sexual abuse while she was visiting her father and stepmother the previous summer.<sup>2</sup> On December 11, 1984, Mr. Peters interviewed Kathryn in order to determine her qualifications as a witness to assist Mr. Curtis in making the decision whether to file criminal charges against Mr. Spencer. Kathryn held to her earlier allegations made against her father in this interview with the deputy prosecutor.<sup>3</sup> In this same time period, Clark County Prosecutors were aware that Mr. Spencer, then employed as a City of Vancouver police officer, was the subject of an internal affairs investigation conducted by the Vancouver Police Department. By early 1985, the investigation

<sup>1</sup> Declaration of James M. Peters, pgs. 1-2.

<sup>2</sup> Peters Declaration, pgs. 3-4; Exhibits 1 and 2 to Krause Declaration (ECF Nos. 64-1 and 64-2).

<sup>3</sup> Peters Declaration, pgs. 3-4.

1 was concluding with the recommendation that Mr. Spencer's employment be terminated. This  
 2 recommendation was based upon findings that Mr. Spencer committed several acts of sexual  
 3 misconduct, including the statutory rape of a teenage neighbor and a determination by  
 4 investigators that he had sexually abused his daughter.<sup>4</sup>

5  
 6 Mr. Curtis ultimately made the decision to file criminal charges against Mr. Spencer. On  
 7 January 3, 1985, Mr. Curtis filed an Information charging Mr. Spencer with two counts of  
 8 statutory rape of his daughter Kathryn.<sup>5</sup> Mr. Spencer was charged and released upon his own  
 9 recognizance. A few days later the Vancouver Police Department terminated Mr. Spencer's  
 10 employment as a police officer based upon the findings made by internal affairs investigators.<sup>6</sup>

11 Mr. Spencer retained James Rulli, then a Clark County criminal defense attorney who  
 12 later became a Clark County Superior Court Judge, to defend him. Because Mr. Spencer was a  
 13 local law enforcement officer, the prosecution was conducted jointly by King County and Clark  
 14 County Prosecutors. The deputy prosecutors assigned were Barbara Linde for King County and  
 15 James Peters for Clark County. The usual discovery orders were entered and a trial date was set.  
 16 As was standard practice, Mr. Rulli was allowed full access to the prosecutor's file.<sup>7</sup>

17  
 18 **B. Amended Information Filed On February 28, 1985**

19 The investigation by the Clark County Sheriff's Office continued. On or about February  
 20 3, 1985, Mr. Spencer was removed by Clark County Sheriff's deputies from the home he shared  
 21 with his then wife Shirley following a domestic disturbance.<sup>8</sup> Shortly thereafter on February 22,  
 22 1985, Detective Krause interviewed Shirley Spencer. In this interview Mrs. Spencer disclosed  
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24 <sup>4</sup> Exhibit 3 to Freimund Declaration (ECF No. 63-3); Peters Declaration pgs. 4-5.

25 <sup>5</sup> Exhibit 2 to Freimund Declaration (ECF No. 63-2).

26 <sup>6</sup> Exhibit 3 to Freimund Declaration (ECF No. 63-2).

<sup>7</sup> Peters Declaration, pgs. 5-6.

<sup>8</sup> Exhibit B to Declaration of Shirley Spencer (ECF No. 54).

1 concerns of possible sexual abuse of her son Matthew Hansen, then age five, who shared the  
 2 Spencer home with his mother and stepfather.<sup>9</sup> This caused Detective Krause to interview  
 3 Matthew Hansen. Detective Krause interviewed Matthew Hansen on February 28, 1985.  
 4 Matthew Hansen disclosed sexual abuse by Mr. Spencer in this interview. Matthew also stated  
 5 that he had observed Mr. Spencer sexually abuse Kathryn and her brother Matthew Spencer when  
 6 they visited the Spencer home the previous summer.<sup>10</sup> Ms. Krause relayed this information to  
 7 Mr. Peters later on February 28. Mr. Peters utilized this new information from Detective Krause  
 8 to obtain a warrant for Mr. Spencer's arrest.<sup>11</sup>

10 Mr. Peters filed a motion to obtain the arrest warrant on February 28, 1985. He supported  
 11 this motion with an affidavit. In the affidavit Mr. Peters stated that he was contacted earlier in the  
 12 day by Detective Krause "who reported the following information."<sup>12</sup> He went on to relay the  
 13 information provided to him by Detective Krause concerning her interview of Matthew Hansen,  
 14 later set forth in her written report of the interview.<sup>13</sup> A Clark County Superior Court judge found  
 15 probable cause, and the warrant was issued.<sup>14</sup> Mr. Spencer was arrested by Clark County  
 16 Sheriff's officers later that day. After waiving *Miranda* warnings, Mr. Spencer spoke to the  
 17 officers. He did not deny the allegations made by Matthew Hansen but stated "I must have done  
 18 it if Little Matt [Hansen] said I did; this can't be my ex-wife this time." When asked if he could  
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23 <sup>9</sup> Exhibit 3 to Declaration of Sharon Krause (ECF No. 64-3); Peters Declaration, pg. 6.

24 <sup>10</sup> Exhibit 3 to Krause Declaration (ECF No. 64-3).

25 <sup>11</sup> Peters Declaration, pg. 6.

26 <sup>12</sup> Exhibit 4 to Freimund Declaration (ECF No. 63-4); Peters Declaration, pg. 6.

<sup>13</sup> Exhibit 4 to Freimund Declaration (ECF No. 63-4); Peters Declaration, pg. 6; Exhibit 3 to Krause Declaration (ECF No. 64-3).

<sup>14</sup> Exhibit 5 to Freimund Declaration (ECF No. 63-5); Peters Declaration, pg. 6.

1 explain Matthew Hansen's reports if the allegations were not true, Mr. Spencer replied, "Well it  
2 must be. I just don't understand why I can't remember it."<sup>15</sup>

3 Based upon the new information obtained by Detective Krause, Mr. Peters filed a First  
4 Amended Information on February 28, 1985, charging Mr. Spencer with several counts of sexual  
5 abuse of Matthew Hansen in addition to the two charges concerning Kathryn Spencer contained in  
6 the original Information filed by Mr. Curtis on January 3, 1985.<sup>16</sup>

7  
8 On March 25, 1985, Detective Krause interviewed Mr. Spencer's then nine year old son  
9 Matthew Spencer. He corroborated Matthew Hansen's account that Mr. Spencer had sexually  
10 abused both boys and Kathryn. Detective Krause re-interviewed Kathryn later the same day. She  
11 corroborated the disclosures of Matthew Hansen and her brother Matthew.<sup>17</sup> These disclosures  
12 led to the filing of a Second Amended Information on May 3, 1985.<sup>18</sup>

### 13 14 **C. Events Leading To The *Alford* Plea**

15 The prosecution of the case proceeded. Mr. Rulli arranged to have his client evaluated by  
16 a psychiatrist, Dr. Dixon, and a psychologist, Dr. McGovern. No defenses of lack of capacity or  
17 insanity were raised.<sup>19</sup> On May 9, 1985, Mr. Peters accompanied Mr. Rulli to Sacramento,  
18 California to allow Mr. Rulli to interview Matthew Spencer and Kathryn Spencer. Both children  
19 held to their allegations.<sup>20</sup> Mr. Peters and Mr. Rulli also interviewed Kathryn's counselor during  
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24 <sup>15</sup> Exhibit 4, pgs. 3-4 to Krause Declaration (ECF No. 64-4).

25 <sup>16</sup> Peters Declaration, pg. 7; Exhibit 2 thereto.

26 <sup>17</sup> Exhibits 5 and 6 to Krause Declaration (ECF Nos. 64-5 and 64-6); Peters Declaration, pg. 7.

<sup>18</sup> Peters Declaration, pg. 7; Exhibit 6 to Freimund Declaration (ECF No. 63-6).

<sup>19</sup> Peters Declaration, pgs. 7-8; Exhibit 5 to Peters Declaration.

<sup>20</sup> Peters Declaration, pg. 8.

1 this trip. The counselor described behaviors on Kathryn's part that were consistent with sexual  
2 abuse.<sup>21</sup>

3         Shortly after Mr. Peters and Mr. Rulli returned from California Mr. Rulli announced that  
4 his client intended to plead guilty to the majority of the counts by *Alford* plea.<sup>22</sup> On May 16,  
5 1985, during a hearing in open court, Mr. Spencer changed his plea from not guilty to an *Alford*  
6 plea. In this plea plaintiff pled guilty to seven counts of first degree statutory rape and four counts  
7 of complicity to first degree statutory rape as part of a plea bargain that resulted in voluntary  
8 dismissal of several of the other counts of statutory rape and complicity to first degree statutory  
9 rape. After details of each charge were read to Mr. Spencer, Judge Thomas Lodge asked him if he  
10 had any basis to refute the children's disclosures of sexual abuse. Mr. Spencer replied "No sir" to  
11 each question by the court. When agreeing to the plea, Mr. Spencer acknowledged that the Court  
12 could sentence him to life imprisonment. Prior to accepting the plea Judge Lodge made an  
13 independent inquiry of Mr. Spencer and his counsel as to his mental competence to enter the pleas  
14 and found that he was mentally competent to do so.<sup>23</sup>

17         Mr. Peters' last act in the prosecution was to attend the sentencing hearing the following  
18 week on May 23, 1985. He left the office of the Clark County Prosecuting Attorney in 1987 to  
19 pursue other professional opportunities.<sup>24</sup>

#### 21 **D. Federal Habeas Corpus Proceeding 1994–1996**

22         In 1994 Mr. Spencer sought relief in federal court after exhausting several attempts in  
23 state court unsuccessfully to collaterally attack the judgment and sentence. He raised several

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25 <sup>21</sup> Peters Declaration, pg. 8.

<sup>22</sup> Exhibit 7 to Freimund Declaration (ECF No. 63-7); Peters Declaration, pg. 8.

<sup>23</sup> Exhibits 7 and 8 to Freimund Declaration (ECF Nos. 63-7 and 63-8).

<sup>24</sup> Peters Declaration pgs. 1-2, 9.

1 federal constitutional claims in this proceeding: (1) his guilty plea was not voluntary because he  
 2 was under the influence of narcotics and other medications and was not competent to enter the  
 3 plea; (2) Sergeant Davidson unlawfully coerced his guilty plea during jail visits due to his alleged  
 4 romantic involvement with Shirley Spencer; (3) the prosecution failed to disclose exculpatory  
 5 evidence, including reports of medical reports of Kathryn Spencer and Matthew Hansen finding  
 6 no medical evidence of abuse; (4) his defense counsel provided ineffective assistance.<sup>25</sup>

8 Following a complete dismissal of the petition by federal district court Judge Robert  
 9 Bryan in December 1994, the Ninth Circuit Court of Appeals affirmed in part and reversed in  
 10 part. The Court of Appeals determined that Mr. Spencer was entitled to an evidentiary hearing to  
 11 determine if he was competent to enter the guilty plea and if there was reasonable probability that  
 12 disclosure of the two medical reports would have caused him to proceed to trial rather than plead  
 13 guilty. In its ruling the Court of Appeals held that Mr. Spencer was adequately represented by his  
 14 defense counsel, especially since Mr. Spencer “did not exactly say that he did not commit the acts,  
 15 but . . . assumed a posture that he could not remember doing them.”<sup>26</sup> The Ninth Circuit opinion  
 16 upheld the dismissal of claims of coercion by Sgt. Davidson and noted during the “repeated  
 17 inquiries by the trial judge” regarding the voluntariness of the guilty were “met with affirmative  
 18 responses” to support a finding that the plea was entered voluntarily and without coercion.<sup>27</sup>

21 Judge Robert Bryan conducted the evidentiary hearing over four days in September 1996.  
 22 Numerous witnesses testified at the hearing including Mr. Peters, Mr. Rulli, Dr. Dixon, several  
 23 medical experts including Rebecca Wiester M.D., a pediatric specialist in child abuse then  
 24 associated with Harborview Medical Center who testified as an expert witness for the State, Ms.

25 <sup>25</sup> Exhibit 13 to Freimund Declaration (ECF No. 63-13).

26 <sup>26</sup> Exhibit 14 to Freimund Declaration, pgs. 8-9 thereto (ECF No. 63-14).

27 <sup>27</sup> Exhibit 14, pgs. 4-5 to Freimund Declaration (ECF No. 63-14).



1 Krause, Mr. Davidson, and Mr. Spencer. Dr. McGovern and Shirley Spencer testified by  
2 deposition.<sup>28</sup>

3 In his oral ruling following the conclusion of four days of testimony Judge Bryan found,  
4 based upon the evidence presented to him at the hearing, that the Clark County Sheriff's Office  
5 did have possession of the medical report concerning Kathryn but did not have the report  
6 concerning Matthew Hansen. Judge Bryan found further that the prosecutor never had possession  
7 of either medical report. Since the prosecutor did not have possession of either report, the  
8 prosecutor did not commit a constitutional violation by failing to turn them over to defense  
9 counsel.<sup>29</sup> Judge Bryan went on to conclude that the medical report concerning Kathryn would  
10 not have been sufficiently exculpatory or persuasive to cause Mr. Spencer to refuse to plead guilty  
11 and proceed to trial. Therefore, Mr. Spencer's constitutional rights under *Brady v. Maryland* were  
12 not violated by the failure of the Clark County Sheriff's deputies to release the report concerning  
13 Kathryn.<sup>30</sup> Judge Bryan also found that Mr. Spencer was competent to enter his guilty plea.<sup>31</sup>

14 Judge Bryan's rulings were upheld in their entirety by the Ninth Circuit Court of Appeals  
15 in 1997.<sup>32</sup>

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17  
18 **E. Clemency Petition And Recantations By Matthew Spencer And Kathryn Spencer**  
19 **Tetz**

20 After several other unsuccessful attempts at post conviction relief in state court, Mr.  
21 Spencer filed a clemency petition in 2003. In 2003, Matthew Spencer, now an adult, wrote to  
22 Governor Locke strongly opposing the granting of clemency and insisted that his father had  
23

24 <sup>28</sup> Exhibit A to Fetterly Declaration.

25 <sup>29</sup> Exhibit C to Fetterly Declaration, pgs. 522-24; Exhibit 15 to Freimund Declaration (ECF No. 63-15).

26 <sup>30</sup> Exhibit D to Fetterly Declaration; Exhibit 15 to Freimund Declaration.

<sup>31</sup> Exhibit 15 to Freimund Declaration (ECF No. 63-15).

<sup>32</sup> Exhibit 16 to Freimund Declaration (ECF No. 63-16).

1 sexually abused him.<sup>33</sup> Despite this opposition, Governor Locke conditionally commuted  
 2 Mr. Spencer's sentence on December 23, 2004. Mr. Spencer was then released from prison.<sup>34</sup>

3 Following their father's release from prison, Mr. Spencer's two biological children,  
 4 Matthew Spencer and Kathryn Spencer Tetz, recanted their prior disclosures of sexual abuse.  
 5 Their recantations formed the basis of another personal restraint petition filed in Division II of the  
 6 Washington State Court of Appeals. Matthew Hansen, the stepson, did not recant. The Court of  
 7 Appeals remanded the case to Clark County for a reference hearing. The sole purpose of the  
 8 reference hearing was to determine whether Matthew Spencer and Kathryn Tetz would testify  
 9 consistently with the declarations setting forth their recantations filed in support of the personal  
 10 restraint petition.<sup>35</sup>

11  
 12 The reference hearing took place in Clark County Superior Court on July 10, 2009.<sup>36</sup>  
 13 Matthew Spencer testified that the abuse did not occur, although he admitted that he had disclosed  
 14 the abuse to Detective Krause when she interviewed him in 1985 and to Mr. Rulli when he  
 15 interviewed the Spencer children in 1985. He also admitted that he had opposed the clemency  
 16 petition in 2003.<sup>37</sup> Kathryn Tetz did not actually recant her earlier allegations but testified that  
 17 she did not believe the abuse occurred because she could not remember it and believed she would  
 18 have remembered if it had occurred.<sup>38</sup> At the close of the reference hearing the superior court  
 19 concluded that Matthew Spencer and Kathryn Tetz testified consistently with their declarations  
 20 filed in the Court of Appeals and returned the case to the Court of Appeals. The Court of Appeals  
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 24 <sup>33</sup> Exhibit 19 to Freimund Declaration (ECF No. 63-19).

25 <sup>34</sup> Exhibit 18 to Freimund Declaration (ECF No. 63-18).

26 <sup>35</sup> Exhibit 20 to Freimund Declaration (ECF No. 63-20).

<sup>36</sup> Exhibit 21 to Freimund Declaration (ECF No. 63-21).

<sup>37</sup> Exhibit F, pgs. 15-16, 29 to Fetterly Declaration.

<sup>38</sup> Exhibit G, pgs. 64-67, 73, 81 to Fetterly Declaration.

1 granted the petition and held that the recantations formed a sufficient factual basis to allow  
 2 Mr. Spencer to withdraw his *Alford* plea.<sup>39</sup>

3 Upon removal from the Court of Appeals, on September 29, 2010, the Clark County  
 4 Superior Court vacated the guilty plea and allowed Mr. Spencer to withdraw his plea.<sup>40</sup> **Matthew**  
 5 **Hansen has never recanted his allegations and still maintains that he was sexually abused by**  
 6 **his former stepfather.**<sup>41</sup> The prosecutor elected not to pursue charges against Mr. Spencer in  
 7 view of the recantations and dismissed the case without prejudice on September 29, 2010.<sup>42</sup> It  
 8 was possible to continue to pursue prosecution on behalf of Matthew Hansen who has never  
 9 recanted his claims of sexual abuse.  
 10

11 Plaintiff filed this civil lawsuit six months later in June of 2011, more than 26 years after  
 12 he pled guilty in May of 1985.  
 13

### 14 III. LAW AND ARGUMENT

#### 15 A. All Plaintiff's State Law Claims Against Defendant Peters Are Barred By The 16 Statute Of Limitations and Failure to Comply with RCW 4.92.110

17 Plaintiff Clyde Ray Spencer alleges state law claims for malicious prosecution,  
 18 intentional infliction of emotional distress, conspiracy, and defamation. Plaintiffs Matthew  
 19 Spencer, born in 1975, and Kathryn Spencer Tetz, born in 1979, allege state law claims for loss  
 20 of consortium. The statute of limitations for all state law claims, with the exception of  
 21 defamation, is three years. RCW 4.16.080(2).

22 Defendant Peters incorporates the argument set forth on pages 2-4 of the Memorandum  
 23 of Authorities of defendant Krause (ECF No. 65) and pgs. 14-15 of the memorandum of  
 24

25 <sup>39</sup> Exhibit 22 to Freimund Declaration (ECF No. 63-22).

<sup>40</sup> Exhibit 25 to Freimund Declaration (ECF No. 63-25).

<sup>41</sup> Matthew Hansen Declaration (ECF No. 54).

<sup>42</sup> Exhibits 25 and 26 to Freimund Declaration (ECF Nos. 63-25 and 63-26).

1 defendant Davidson (ECF No. 62). As with the other individual defendants, the three year  
 2 statute of limitations for all state law claims of Clyde Ray Spencer except for defamation  
 3 claims accrued when he was sentenced in May of 1985 and ran three years later in May of  
 4 1988. The claims of his two adult children accrued when they each attained age 18 and ran in  
 5 1996 for Matthew and 2000 for Kathryn.  
 6

7 Defamation is governed by a two year statute of limitations. RCW 4.16.100(1).  
 8 Defendant wrote his letter to the editor of the Vancouver Columbian newspaper in October  
 9 2005.<sup>43</sup> The two year statute of limitations ran for this claim in October 2007.

10 In addition the state law claims against defendant Peters are barred for failure of  
 11 plaintiff's to demonstrate compliance with the claim filing statute, Rev. Code of Wash.  
 12 4.92.110. Defendant Peters incorporates the argument on this issue set forth on page four of  
 13 the Motion for Summary Judgment of defendant Krause (ECF No. 65).  
 14

15 **B. James Peters is Entitled to Absolute Immunity for All Acts That Occurred During**  
 16 **The Prosecution of Clyde Ray Spencer**

17 **1. Summary Judgment Standard For Defense Of Immunity**

18 Official immunity, whether qualified or absolute, is "an *immunity from suit* rather than  
 19 a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct 2806, 86 L. Ed.  
 20 2d 411 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S. Ct 2727, 73 L. Ed. 2d  
 21 396 (1982) (emphasis in original). When a defendant claiming absolute or qualified immunity  
 22 moves for summary judgment, the plaintiff must go beyond the allegations in his pleadings and  
 23 produce admissible evidence sufficient to meet his burden to demonstrate the existence of a  
 24 genuine issue of material fact. *Butler v. San Diego Dist. Attorney's Office*, 370 F.3d 956, 962  
 25

26 <sup>43</sup> Peters Declaration, pgs. 10-11.

(9th Cir. 2004) (citing *Celotex Corp. v. Catrell*, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). As in any summary judgment motion, this burden is not met by speculation or conjecture. *Id.*; *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). To defeat summary judgment, the nonmoving party must produce “significant probative evidence” supporting the allegations contained in the complaint. *T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

## 2. Absolute Immunity

It is well established that a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the State’s case is absolutely immune from a civil suit for damages under 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). In *Imbler*, plaintiff’s conviction was vacated following a habeas corpus proceeding based upon cumulative misconduct of prosecutors who withheld evidence from the defense. Despite such misconduct, the United States Supreme Court upheld the dismissal of the damage action brought by the released prisoners. In so doing, the Supreme Court held that a prosecutor “is immune from a civil action for malicious prosecution based upon an indictment and prosecution, although it results in a verdict of not guilty by a jury” or later vacation of a verdict of guilty in a post conviction proceeding. 424 U.S. at 422.

The public policy considerations supporting absolute prosecutorial immunity are sound. Suits for damages against prosecutors could be expected with some frequency, the Supreme Court noted, as a defendant in a criminal proceeding who is later exonerated “often will

1 transfer his resentment at being prosecuted into the ascription of improper and malicious  
 2 actions to the State's advocate." *Id.* at 425. If a prosecutor were only granted qualified  
 3 immunity, the threat of a § 1983 damage suit would undermine performance of his duties as a  
 4 prosecutor is bound to exercise judgment in both deciding which suits to bring and in  
 5 conducting them. *Id.* at 424. If a prosecutor were required to answer in court each time a  
 6 person charged him with wrongdoing "his energy and attention would be diverted from the  
 7 pressing duty of enforcing the criminal law." *Id.* at 425.

9 Because of these policy considerations, the Supreme Court held that prosecutorial  
 10 misconduct is best addressed in post trial proceedings to determine whether the defendant had  
 11 a fair trial, including direct appeals and state and federal post conviction proceedings, and by  
 12 professional discipline of a prosecutor who commits misconduct. *Id.* at 427-29. It cannot and  
 13 should not be addressed by allowing a defendant to recover damages against a prosecutor in a §  
 14 1983 action. *Id.*

16 The principle of absolute prosecutorial immunity has been upheld continually by the  
 17 federal courts since *Imbler*. As recently as 2009 the United States Supreme Court in *Van de*  
 18 *Kamp v. Goldstein*, 555 U.S. 335, 129 S. Ct. 855, 172 L. Ed. 2d 708 (2009), affirmed the  
 19 policy considerations set forth in *Imbler* and held that prosecutors are entitled to absolute  
 20 immunity for failure to disclose evidence which could have been used by defense counsel  
 21 during trial to impeach prosecution witnesses. Prosecutors are entitled to absolute immunity  
 22 when conferring with potential witnesses for the purpose of determining whether to initiate a  
 23 prosecution as it is a process "intimately associated with the judicial phase of the criminal  
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process.” *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), cert denied, *Rowland v. Demery*, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985).

In *Demery* the Court rejected the argument of plaintiff that a prosecutor’s interview of a witness prior to making a decision to charge was an “investigative” as opposed to prosecutorial function and, therefore, only subject to qualified immunity. The Court rejected this argument and held that conferring with potential witnesses for the purpose of determining whether to initiate proceedings is “intimately associated with the judicial phase of the criminal process.” *Id.* at 1144 (citing *Imbler*, 424 U.S. at 430). See also, *Mullinax v. McElhenney*, 817 F.2d 711 (11th Cir. 1987) (absolute immunity for witness interviews by prosecutor prior to making the charging decision.); *Springmen v. Williams*, 122 F.3d 211 (4th Cir. 1997) (absolute immunity for acts leading up to the charging decision).

In case after case involving egregious prosecutorial misconduct, the courts have held that absolute prosecutorial immunity bars a § 1983 action against the prosecutor. *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (absolute immunity for destruction of evidence and falsifying line up reports); *Lee v. Willins*, 474 F. Supp. 970 (E.D. NY 1979) (prosecutor who coerced false testimony entitled to absolute immunity); *Mullinax v. McElhenny*, supra (absolute immunity for prosecutor’s suborning perjury in witness interview before charging).

A limited exception to the doctrine of absolute immunity exists when a prosecutor acts as a “complaining witness” and personally attests to the veracity of facts contained in an affidavit. *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (prosecutor personally swore to the truth of facts contained in a certification for determination of probable cause to support a motion for an arrest warrant, facts which turned out to be false).

1 This exception, however, is limited to situations as in *Kalina* where the prosecutor is  
 2 “*personally attesting to the truth* of the averments in the certificate” which constituted the  
 3 factual basis to support the motion for the arrest warrant. *Id.* at 129. (emphasis added.) When  
 4 personal attestation by the prosecutor is not present, absolute immunity applies. *Id.*

5  
 6 In *Waggy v. Spokane County*, 594 F.3d 707 (9th Cir. 2010), the Ninth Circuit held that  
 7 a prosecutor was entitled to absolute immunity for filing an affidavit in support of an arrest  
 8 warrant. The Court in *Waggy* distinguished *Kalina* where the prosecutor had “personally  
 9 vouched under penalty of perjury for the veracity of the statement contained in the  
 10 certification.” 594 F.3d at 710. In contrast, the prosecutor in *Waggy* incorporated facts  
 11 provided to her by law enforcement officers in her affidavit and did not personally attest to the  
 12 truth of this information, although she used these facts to support her motion for an arrest  
 13 warrant.  
 14

15 The prosecutor’s actions, the Ninth Circuit noted in *Waggy*, “were those of an attorney  
 16 and not a sworn witness.” *Id.* at 712. The act of procuring a warrant, the court noted, is one  
 17 “intimately associated with the judicial phase of the process.” *Id.* at 713. (citing *Imbler*).  
 18 Presenting a motion supported by an affidavit “averring to the facts” clearly involves the  
 19 prosecutor’s ‘role as advocate for the State,’ rather than her role of administrator or  
 20 investigative officer. 594 F.3d at 712-13. *See also, Springman v. Williams*, *supra*  
 21 (prosecutor’s affidavit supporting charging document reciting information obtained from law  
 22 enforcement officer is distinct from *Kalina* and the prosecutor making the affidavit is entitled  
 23 to absolute immunity); *Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999) (prosecutor’s initiation of  
 24 charges “on information and belief” was not a “personal attestation” to make the prosecutor a  
 25  
 26



1 “complaining witness” as in *Kalina*. Prosecutor entitled to absolute immunity for false  
2 statements in the affidavit). *Id.* at 1008.

3 James Peters is entitled to absolute immunity for all actions related to his participation  
4 in the prosecution of Clyde Ray Spencer in 1984 and 1985. These include the interview of  
5 Kathryn Spencer prior to the decision to charge made by the elected prosecutor, Mr. Peters’ act  
6 in procuring the arrest warrant on February 28, 1985, and all other matters concerning the  
7 conduct of the prosecution, including the alleged failure to turn over “exculpatory evidence”  
8 contained in medical reports concerning Kathryn Spencer and Matthew Hansen to defense  
9 counsel, reports it was later determined that he never had in his possession.  
10

11 The actions of defendant Peters in obtaining the arrest warrant on February 28, 1985,  
12 prior to the filing of First Amended Information charging Mr. Spencer with new crimes against  
13 his stepson Matthew Hansen, are also subject to absolute immunity. James Peters did not  
14 personally attest to the truth of the information set forth in the affidavit filed in support of the  
15 arrest warrant on February 28, 1985. In contrast to the prosecutor in *Kalina*, he only swore to  
16 the fact that Detective Krause had “reported the following information” concerning her  
17 interview of Matthew Hansen that took place earlier on February 28. The affidavit went on to  
18 summarize the information which, if proven, would support a conviction for sexual abuse of  
19 Matthew Hansen.<sup>44</sup> Defendant Peters did not personally attest to the truth of Matthew  
20 Hansen’s allegations. He only personally attested to the fact that Detective Krause had  
21 contacted him and had conveyed this information to him earlier on February 28. He did not  
22 personally attest to the truth of the information provided to him by Detective Krause. Even  
23  
24  
25

26 <sup>44</sup> Exhibit 4, pg. 2 to Freimund Declaration (ECF No. 63-4).

1 assuming that the information told to him by Detective Krause was false, which it was not,  
 2 defendant Peters' actions in using the information to support the motion for the arrest warrant  
 3 are protected by absolute immunity.

4 **C. Alternatively, Defendant Peters Is Entitled To Qualified Immunity**

5  
 6 Even if absolute immunity was not applicable, defendant Peters is entitled to qualified  
 7 immunity for all acts related to the prosecution. Law enforcement officers are entitled to  
 8 qualified immunity from § 1983 claims when (1) no federal constitutional right has been  
 9 violated, or (2) even if a violation is established, the right was not clearly established at the  
 10 time of the challenged conduct sufficient to make a reasonable officer aware that he was  
 11 violating the right. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). This immunity  
 12 provides "ample room for mistaken judgment" by protecting all but the plainly incompetent or  
 13 those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Qualified  
 14 immunity shields defendant Peters from plaintiff's damage action because there is no evidence  
 15 that his conduct was unlawful in light of settled law in 1985.

17 **1. Qualified Immunity Based Upon Probable Cause**

18 Probable cause is a complete defense to Mr. Spencer's claims for malicious  
 19 prosecution, false arrest, and false imprisonment. *Lassiter v. City of Bremerton*, 556 F.3d  
 20 1049, 1054-55 (9th Cir. 2009). Law enforcement officers are entitled to qualified immunity  
 21 when a reasonable officer could have believed probable cause existed to arrest and charge  
 22 plaintiff with a crime. *Hunter*, U.S. at 230. Probable cause exists when officers have  
 23 knowledge based upon reasonably trustworthy information that the person arrested committed  
 24 a criminal offense. *Cunningham v. City of Wenatchee*, 345 F.3d 802, 811 (9th Cir. 2003), cert  
 25  
 26

1 denied, 541 U.S. 1010 (2001). Child disclosures of sexual abuse standing alone are sufficient  
 2 to establish probable cause to charge the crime of sex abuse. *Doggett v. Perez*, 348 F. Supp.2d  
 3 1198, 1204 (E.D. WA 2004).

4 Probable cause existed to initiate the prosecution of Mr. Spencer, even assuming  
 5 Mr. Peters actually made the initial decision to charge on January 3, 1985, which he did not.  
 6 Probable cause existed from the interviews of Kathryn and others by Detective Krause  
 7 completed in October of 1984. Probable cause existed to file the application for an arrest  
 8 warrant and to file an Amended Information on February 28, 1985, charging Mr. Spencer with  
 9 the sexual abuse of his stepson Matthew Hansen. Probable cause was based upon the  
 10 disclosures made to Detective Krause by Matthew Hansen earlier on February 1985.<sup>45</sup> There  
 11 was no reason for Mr. Peters to believe that the information conveyed to him on February 28  
 12 by Detective Krause was false. Matthew Hansen has never recanted his allegations against his  
 13 stepfather and maintains to this day that he was sexually abused by his stepfather.<sup>46</sup> There is  
 14 no evidence to support a conclusion that Detective Krause, much less James Peters, fabricated  
 15 Matthew Hansen's allegations. Probable cause existed to continue the prosecution of  
 16 Mr. Spencer for sexual abuse of Matthew Hansen based upon Mr. Spencer's damaging  
 17 admission made following his arrest on February 28 that his stepson's allegations "must be  
 18 true."<sup>47</sup>  
 19

20 Probable cause existed to file the Second Amended Information on May 3, 1985, based  
 21 upon Detective Krause's interviews of Matthew Spencer and Kathryn Spencer on March 25,  
 22

23  
 24  
 25 <sup>45</sup> Exhibit 3 to Krause Declaration (ECF No. 64-3).

26 <sup>46</sup> Declaration of Matthew Hansen (ECF No. 54).

<sup>47</sup> Exhibit 4, pgs. 3-4 to Krause Declaration (ECF No. 64-4).

1 1985.<sup>48</sup> In 2009, Matthew Spencer testified in the reference hearing that he did in fact make  
 2 disclosure of sexual abuse to Detective Krause in March of 1985, even though he recanted his  
 3 allegations in support of his father's 2007 personal restraint petition.<sup>49</sup>

4 Mr. Peters had probable cause to continue with the prosecution. In addition to the  
 5 statements of the child witnesses, potential child hearsay testimony from Shirley Spencer and  
 6 Detective Krause supported the allegations of abuse, as did the potential testimony from the  
 7 counselors for the Spencer children.<sup>50</sup> Finally, Mr. Spencer chose to plead guilty to many of  
 8 the charges. Mr. Peters had no reason to believe he was not competent to do so and had no  
 9 reason or duty to challenge the determination made by Judge Lodge who accepted the plea  
 10 after thoroughly questioning Mr. Spencer in open court when he accepted the guilty plea on  
 11 May 16, 1985.<sup>51</sup>

## 12 **2. Qualified Immunity for Alleged Deliberate Fabrication of Evidence**

13 There is no constitutional due process right to have a child witness in a sexual abuse  
 14 case interviewed in a particular manner. *Devereaux*, 263 F.3d at 1075. To withstand summary  
 15 judgment, plaintiff must present evidence of (1) defendants continued their investigation  
 16 despite that they knew or should have known plaintiff was innocent; (2) defendants used  
 17 investigative techniques so coercive and abusive that they knew or should have known those  
 18 techniques would yield false information. *Id.* at 1076. *See also, Cunningham v. City of*  
 19 *Wenatchee*, 345 F.3d 802, 811 (9th Cir. 2003), cert denied, 541 U.S. 1010 (2004).  
 20  
 21  
 22  
 23  
 24

25 <sup>48</sup> Exhibits 5 and 6 to Krause Declaration.

26 <sup>49</sup> Exhibit F, pgs. 15-16, 29 to Fetterly Declaration.

<sup>50</sup> Peters Declaration pgs. 4-8.

<sup>51</sup> Peters Declaration pgs. 5-6; Exhibit 8 to Freimund Declaration.

1 Plaintiffs cannot prove defendant Peters knew or should have known Mr. Spencer was  
 2 innocent or that the information Detective Krause provided to him, upon which the charging  
 3 decisions were based, was false. If believed by jurors, the information provided to defendant  
 4 Peters by Detective Krause was sufficient to convict Mr. Spencer. Matthew Spencer testified  
 5 as an adult in 2009 that he did disclose sexual abuse to Detective Krause in 1985.<sup>52</sup> Matthew  
 6 Hansen to this day maintains that the abuse occurred.<sup>53</sup> Defendant Peters had no reason to  
 7 believe that Detective Krause was not truthful when she relayed the statements of the Spencer  
 8 children and of Matthew Hansen to prosecutors in 1984 and 1985.  
 9

10 **D. Clyde Ray Spencer is Collaterally Estopped from Re-Litigating His Claims That**  
 11 **James Peters Violated His Constitutional Rights**

12 Defendant Peters incorporates the arguments on collateral estoppel contained in the  
 13 briefs filed by defendant Krause (pgs. 4-8) and defendant Davidson (pgs. 15-19).

14 In his habeas corpus proceeding filed in 1994 Mr. Spencer alleged violation of his  
 15 federal constitutional rights based upon: (1) incompetence of defense counsel; (2) lack of  
 16 competence to enter his plea of guilty because he was under the influence of drugs and  
 17 suffering severe depression caused or contributed to by pressure to confess by Sgt. Davidson;  
 18 and (3) medical reports concerning Kathryn and Matthew Hansen which were negative for  
 19 physical findings of sexual abuse were unconstitutionally withheld from his counsel in  
 20 violation of *Brady v. Maryland*.<sup>54</sup> The Ninth Circuit Court of Appeals in 1996 ordered an  
 21 evidentiary hearing held on the two latter issues.<sup>55</sup>  
 22  
 23  
 24

25 <sup>52</sup> Exhibit F, pgs. 15-16, 29 to Fetterly Declaration.

26 <sup>53</sup> Declaration of Matthew Hansen (ECF No. 54).

<sup>54</sup> Exhibits 13-16 to Freimund Declaration (ECF Nos. 63-13, 64-14, 63-15, and 63-16).

<sup>55</sup> Exhibit 16 to Freimund Declaration (ECF No. 63-16).

1 This evidentiary hearing took place over three days before Judge Robert Bryan in  
 2 September of 1996. The court heard testimony from over eleven witnesses over four days,  
 3 including testimony from several physicians and other expert witnesses.<sup>56</sup> At the close of the  
 4 testimony Judge Bryan made findings of fact and conclusion of law that Mr. Spencer's federal  
 5 constitutional rights were not violated by law enforcement officers or by the Clark County  
 6 Prosecuting Attorney's Office. These findings were made following a full adjudication on the  
 7 merits of the same issues Mr. Spencer now raises. Mr. Spencer was a party to that proceeding.  
 8 Judge Bryan's findings are binding upon him by principles of collateral estoppel.

10 The findings of fact and conclusions of law formally entered by Judge Bryan on  
 11 September 25, 1996, totally exonerated James Peters and the Clark County Prosecutor's Office  
 12 from claims that they committed prosecutorial misconduct by allegedly withholding the  
 13 medical reports on two of the three victims. At the close of the hearing Judge Bryan found that  
 14 the report concerning Matthew Hansen was never in the possession of the Clark County  
 15 Sheriff's Office or the Prosecuting Attorney's Office.<sup>57</sup> He found that the report concerning  
 16 Kathryn was in the possession of the Sheriff's Office but was never turned over to the  
 17 prosecutor.<sup>58</sup> Judge Bryan went on to find that, even if the medical report could have been  
 18 used by defense counsel to attack Kathryn's credibility, it was not sufficient to negate acts of  
 19 sexual abuse because the evidence against Mr. Spencer was overwhelming when he entered his  
 20 plea of guilty. Therefore, the withholding of the medical report concerning Kathryn by the  
 21  
 22

23  
 24 <sup>56</sup> Exhibits A, B1-B5 to Fetterly Declaration.

25 <sup>57</sup> "My conclusion is that . . . the report [concerning Matthew Hansen] was not in the hands of the  
 26 Sheriff's office or the prosecutor prior to the plea.: Oral ruling of Judge Bryan, pg. 523; Exhibit C to Fetterly Declaration.

<sup>58</sup> "I am satisfied that if they [the medical reports] had gone to the prosecutor, they would have gone to Mr. Rulli." Oral Ruling of Judge Bryan, pg. 524; Exhibit C to Fetterly Declaration.

1 Sherriff's Office did not violate *Brady v. Maryland*, 373 U.S. 83, 87 (1963) or *Sanchez v.*  
 2 *United States*, 50 F.3d 1448, 1454 (9th Cir. 1995).<sup>59</sup>

3 Judge Bryan also found that Mr. Spencer was legally competent to enter the *Alford* plea  
 4 in May of 1985, and that his plea was voluntary. In so ruling Judge Bryan referenced the  
 5 testimony of Mr. Rulli, Mr. Peters and "indirectly the plea colloquy of Judge Lodge, none of  
 6 whom saw any signs of mental illness." Judge Bryan went on to reference the medical  
 7 testimony presented including the testimony of Dr. Dixon, "all of whom testified that he [Mr.  
 8 Spencer] appeared to be competent in the legal sense." The judge noted the "best evidence" to  
 9 be the plea colloquy which demonstrated rational and appropriate responses to questions as  
 10 well as a factual understanding of the proceedings, sufficient ability to consult with counsel  
 11 and ability to make a reasoned choice. All supported a conclusion of legal competence to enter  
 12 the *Alford* plea.<sup>60</sup>

13 These findings of fact and conclusion of law made by Judge Bryan collaterally estop  
 14 Mr. Spencer from raising these same claims of alleged constitutional violations 15 years later.  
 15  
 16  
 17  
 18

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19 <sup>59</sup> Exhibit 15 to Freimund Declaration, pgs. 3-4 (ECF No. 63-15). In his findings of fact and conclusions  
 20 of law Judge Bryan noted that the medical report concerning Kathryn would only have been material if she were  
 21 to testify to full vaginal penetration, not a required element to prove statutory rape in the first degree in 1985.  
 22 Wash. Rev. Code 9A.44.010(1) and 9A.44.070 (1979) (amended 1986) (repealed by Laws 1988, Ch. 145 § 24).  
 23 Therefore, the medical report would not negate the acts of sexual abuse charged and "the absence of physical  
 24 symptoms does not conclusively indicate a lack of full vaginal penetration and is certainly inconclusive as to Mr.  
 25 Spencer's guilt of those crimes that he pleads guilty to." If defense counsel had the medical report, "it would not  
 26 have been sufficiently exculpatory or persuasive to cause him to plead not guilty and to go to trial," as Kathryn  
 Spencer's medical report was not likely to persuade the trier of fact that Mr. Spencer was not guilty of the crimes  
 charged. Exhibit D to Fetterly Declaration, pgs. 3-4. Judge Bryan's findings and conclusions on this issue were  
 supported by the medical testimony presented over the four day hearing. This included the testimony of the two  
 examiners that their examinations were cursory and only sought to document obvious trauma which could have  
 healed before the examinations took place. Additionally, Dr. Wiester, the state's expert, testified that slight  
 penetration sufficient to constitute sexual abuse typically occurs in the absence of physical findings. Exhibits B-1,  
 B-2, and B-5 to Fetterly Declaration.

<sup>60</sup> Exhibit C to Fetterly Declaration, pgs. 520-22.

**E. There Is No Evidence Defendant Peters Was Part Of A Conspiracy To Arrest, Charge And Convict Plaintiff With A Crime**

A conspiracy in violation of § 1983 claim requires proof of (1) agreement between the defendants to deprive the plaintiff of a constitutional right; (2) an overt act in furtherance of the conspiracy; and (3) a constitutional violation. *Gausvik v. Abbey*, 239 F. Supp. at 1104. There is no evidence that defendant Peters entered into an “agreement” with other defendants to violate Mr. Spencer’s constitutional rights.

**IV. CONCLUSION**

Based upon the foregoing, the motion of defendant James Peters for summary judgment should be granted and all claims against him dismissed with prejudice.

DATED this 24<sup>th</sup> day of May, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> of May, 2012, I caused to be electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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